From: Robert Randall
To: Microsoft ATR
Date: 1/28/02 4:36pm
Subject: Microsoft Settlement

Attached, in WordPerfect format are a cover letter and comments regarding whether the Microsoft settlement is in the public interest.

Let me know if you have difficulty opening the attached WordPerfect files.

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26 January 2002

Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D street NW, Suite 1200
Washington, DC 20530-0001

Dear Ms. Hesse:

Accompanying are public comments regarding the proposed Microsoft settlement submitted for consideration pursuant to the Tunney Act proceedings before the District Court for the District of Columbia.

I am not a lawyer, computer professional, or Microsoft competitor. I use personal computers to perform business "office" functions and am concerned by how unwieldy and unreliable Windows has become as new "features" I do not want or use are incorporated. I also use Linux and find it better than Windows for my needs. However, few of the specialized applications programs I need for my work (in addition to general purpose "office" applications) are available for that platform without custom programming or adaptation so using Windows is a practical necessity.

Microsoft products are priced considerably higher than their functional equivalents by other publishers, a phenomenon I attribute to Microsoft's monopoly pricing power that the instant Tunney Act proceedings are intended to curb in the public interest while not losing the benefits of vigorous innovation in computer and communications technology.

You have my permission to publish these comments and to make whatever use of them in the Tunney Act proceedings you see fit. I hope these comments will be helpful to the Court.

Respectfully submitted,

Robert L Randall

Is the Microsoft Settlement in the Public Interest?

The settlement negotiated between Microsoft and the Justice Department and several of the plaintiff States appears to rest on the dubious proposition that the public interest is synonymous with the summation of private interests. Secondly, while the settlement arguably addresses the "middleware" problem that was the focus of much attention in the trial, it is weak, if not completely ineffectual, with respect to the equally important prevention of Microsoft's apparent extension of its operating system monopoly to the most widely used business applications software programs. These observations are amplified below.

While the Sherman Act provides for a private right of action seeking trebling of private damages suffered from monopolization, its strong feature was declaring monopoly and monopolization to be detrimental to the general public interest beyond the summation of losses to identifiable private parties who might sue. These days, in a case such as this, the loss to the general public interest might be seen as a stifling and channeling of innovation into forms approved by the monopolist, a hard-to-predict and quantify loss to an undefined and disparate "public." This is the putative loss the Sherman Act is intended to mitigate through the Tunney Act proceedings.

The Justice Department observed in its Competitive Impact Statement that the Court does not have the authority to write a different settlement that it might prefer and that what might emerge from further proceedings, and when, in the event the Court rejects the settlement as not in the public interest is indeterminate. It is also the case that several plaintiff States have not agreed to the instant settlement, though they could yet do so, suggesting that any final resolution with respect to their continuing action would need to be integrated, or made compatible, with this negotiated settlement in the event this settlement is accepted by the Court, if the public interest is not to be undermined by a patchwork of remedies applied to one monopolist by various parties. Moreover, it must also be observed that if this settlement is approved for all the practical reasons noted by the Justice Department, it is also nearly a foregone conclusion that another, more far-reaching governmental antitrust action against Microsoft is practically precluded during the five years duration of this consent decree, even if the consent decree were manifestly not working adequately. In the fast moving field of computers, software, communications, entertainment, and their conjunction -- of possibly great value to at least some members of the public -- five years is a long time. Lastly, it must be noted that Microsoft is likely to be the landmark case in applying antitrust law and principles to fast moving, high-technology businesses so it is important to get a sound foundation in place for future reference and consideration.

The Court found at trial, and the Court of Appeals affirmed, that Microsoft has a monopoly in its

Windows operating system for Intel-compatible personal computers (without any finding that its Windows monopoly is either *per se* unlawful or unlawfully obtained) and that Microsoft had reinforced and extended its monopoly by a variety of business practices that the instant remedy is intended to rectify. Indeed, the trial Court asserted at some length that computer operating systems may be a natural monopoly in that: (a) the customer generally is buying the computer for the functionality provided by their chosen application programs, (b) OEMS have an over-riding need to sell a machine that works with their hardware and the unknown customer's application programs, (c) software publishers find it easier and more economical to write for only one operating system rather than for several platforms, and (d) most customers want the operating system that works with the most readily available standard software so as to be protected with respect to future needs not fully foreseeable now.

The Court's Findings of Fact noted that while most *consumers* might have no objection to a "free" internet browser bolted into their Windows operating system, many *business customers* might prefer not to make it easy for their employees to browse the Internet if their duties do not require it. More generally, there may be a broader divergence of what features, capabilities, and level of "pre-integration" is wanted and valued by household consumers and by business (office) customers for personal computers, and possibly by other significant identifiable market segments for personal computers. Whether or not the new features may be in some sense "free" of extra charge, they manifestly take up more memory, disk space, and other computer resources, none of which are free, and may be more prone to "bugs", security holes, and incompatibilities unrelated to the features a particular user actually wants, needs, values, and in purchasing a personal computer system.

Much of the trial was taken up with "middleware", in particular internet browsers and the Java programming language, as both were seen as actually -- or at least potentially -- offering a new standard set of applications programming interfaces ("hooks") for other, unrelated application programs of possibly less market penetration potential, while the "middleware" itself is more susceptible of being made compatible with non-Windows operating systems (or even native code interfaces) on the machine hardware side. Others can comment more perceptively on how effectively the settlement addresses that problem through its proposed Technical Committee.

Though not as thoroughly addressed at trial, Microsoft appears to have extended its Windows monopoly into the large business applications software market (e.g., word processing, spread-sheets, small databases) through the same kinds of business practices as were found unlawful with respect to "middleware." That is, when word processing, spreadsheets, and databases were observed to be applications that were inducing businesses (including government, non-profit, etc., "office" environments) to buy computers to put on nearly every employee's desk, Microsoft first tried to program such applications themselves, then if unsuccessful, buy up a third-rate contender in the field, threaten the first-rate contender that if they didn't sell out Microsoft would not make new API "hook" information available to them on a competitively timely basis, and apparently design special, undisclosed "hooks" into Windows that would make Microsoft's own applications software run better, faster, and/or more reliably than competitors' products, such compatibility providing great marketing advantage (and commanding higher market prices) over rival applications program publishers whose products might be functional

superior to Microsoft's offerings in consumers' perceptions. Microsoft thereby eventually established a monopoly for these widely used, and lucrative, "business" application programs.

Whether the Technical Committee approach proposed works for "middleware", where there are likely to be only a few, very sophisticated "middleware" developers, it is likely to be much less successful in providing relief to general software and applications developers and publishers, who are less likely to have the depth of programming expertise of a middleware developer, or to be able to make a good case for requesting new API "hooks" of Microsoft's Windows that might be helpful to their new application, yet that might have the potential to become the new "next big thing." (That adaptability for new or special needs is one of the great virtues of open-source operating systems like Linux as one can add new API hooks as needed and push them into the operating system when the application program loads. Microsoft, of course, is unalterably opposed to open-source software as an expropriation of their intellectual property. While that may be their legitimately chosen business strategy, it leaves them open to antitrust charges if they exercise monopoly power in pursuing such a strategy.)

In summary, the Court should carefully consider whether the negotiated settlement decree will fully and reasonably protect the public from stifling and channeling of innovation in personal computers, aside from its direct effects on competitive private parties. In particular, the Court should inquire carefully into whether the Technical Committee approach underlying the proposed consent decree, particularly with respect to general applications developers/publishers as distinguished from "middleware" developers is sufficient to protect the public interest in this fast moving field.

Respectfully submitted,

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